

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2007 Session

PAUL LELAND v. LOUISVILLE LADDER GROUP LLC, ET AL.

**Appeal from the Circuit Court for Rutherford County
No. 50297 Robert E. Corlew, III, Judge**

No. M2006-02109-COA-R3-CV - Filed December 5, 2007

The trial court summarily dismissed this malicious prosecution action arising out of criminal charges prosecuted by the defendants that the plaintiff had stolen assets while an employee of one of the defendants. We conclude the defendants did not negate one of the essential elements of plaintiff's claim, that element being that the defendants did not have probable cause to believe, at the time they prosecuted the criminal case, that the plaintiff had stolen the ladders. We have also concluded that the trial court erroneously placed the burden of proof upon the plaintiff to prove that the defendants lacked probable cause when they prosecuted the case against him. Accordingly, we reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and DONALD P. HARRIS, SENIOR J., joined.

L. Gilbert Anglin, Peter V. Hall, Murfreesboro, Tennessee, for the appellant, Paul Leland.

James B. Johnson, Nashville, Tennessee, John L. Tate, Louisville, Kentucky, for the appellees Louisville Ladder Group LLC, a Delaware Limited Liability Company; and David Patterson, Individually and in his capacity as Agent and Employee of Defendant Louisville Ladder Group LLC.

OPINION

This appeal arises from the summary judgment granted Louisville Ladder Group, LLC and its employee, David Patterson, in a malicious prosecution action brought by Paul Leland.

I. BACKGROUND

Louisville Ladder Group, LLC ("LLG") is a manufacturer and distributor of ladders. Mr. Leland originally became an employee of LLG in 1993. He quit for a brief period over a salary dispute and was rehired in March of 1996 to work at LLG's Smyrna plant. Initially, Mr. Leland was assistant manager for shipping and receiving and was later promoted to inventory control specialist.

Part of the inventory being held by LLG were large numbers of returned or blemished ladders that are described as “blue tag” ladders. It is undisputed that Mr. Leland’s practice was to sell some of these “blue tag” ladders at flea markets and auctions for his own personal gain, but the parties dispute whether Mr. Leland legitimately acquired all the “blue tag” ladders he tried to sell.

Mr. David Patterson was hired in May of 2000 as the new facility manager at LLG’s Smyrna plant. During the summer of 2000, LLG performed an inventory analysis which revealed an inventory shortage. In October of 2000, LLG hired a private detective agency to investigate whether employees at the Smyrna plant were stealing ladders. As part of that investigation, Mr. Leland was videotaped removing ladders from the Smyrna facility. This was reported to the Smyrna Police Department. A search warrant was issued in November of 2000 to search Mr. Leland’s home where property purportedly belonging to LLG was discovered. Based upon these discoveries, Mr. Leland was terminated from employment with LLG in November of 2000.

A grand jury issued an indictment against Mr. Leland for theft in February of 2001. LLG hired a special prosecutor to pursue the criminal action against Mr. Leland. After a trial wherein his attorneys presented receipts showing Mr. Leland purchased some ladders from LLG, Mr. Leland was acquitted on June 24, 2003. Mr. Leland did not testify in the criminal proceeding.

Maintaining that Mr. Leland stole the ladders, LLG filed suit in Kentucky against its insurance company, Federal Insurance Company, seeking to recover under its insurance policy for the loss allegedly sustained due to Mr. Leland’s theft. Mr. Leland testified in the Kentucky civil proceedings by deposition and claimed that he legitimately acquired the ladders from LLG. In September of 2004, the jury returned a verdict in the form of Verdict Questions finding that Mr. Leland “and/or” two other employees stole ladders from LLG and that LLG’s insurance company was responsible for the loss resulting in an award to LLG of \$715,773.

While the Kentucky case was pending between LLG and its insurer, Mr. Leland initiated this action against LLG and its facility manager, David Patterson, for malicious prosecution. The defendants will hereinafter collectively be referred to as “Louisville Defendants.” The Louisville Defendants filed a motion for summary judgment seeking dismissal on the ground that the Kentucky judgment was “a verdict finding that [LLG] suffered significant theft loss due to Paul Leland’s criminal activity, and the jury’s verdict is irrefutable proof that [LLG] had ‘probable cause’ for accusing Leland of theft.”¹

The trial court granted summary judgment to the Louisville Defendants finding that there were no genuine issues of material fact surrounding the conclusion that the Louisville Defendants had probable cause to pursue Mr. Leland’s criminal prosecution.

II. STANDARDS FOR SUMMARY JUDGMENT

¹The motion also sought dismissal of Mr. Patterson individually, but was not ruled on by the trial judge and is not at issue on appeal.

In order to meet the requirements for summary judgment, a defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366, 373 (Tenn. 2007); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party fails to meet this burden, then the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party, and the motion must be denied. *Cumulus Broadcasting*, 226 S.W.3d at 374; *Staples*, 15 S.W.3d at 88-89.

If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d at 89. In that situation, the non-moving party has the burden of pointing out, rehabilitating, or providing new evidence to create a factual dispute as to the material element in dispute. *Staples*, 15 S.W.3d at 89; *Rains v. Bend of the River*, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003).

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Cumulus Broadcasting*, 226 S.W.3d at 373; *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763; *Staples*, 15 S.W.3d at 88.

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764; *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88.

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001), *cert. den.*, 534 U.S. 823 (2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). “[I]f there is a dispute as to any material fact or any

doubt as to the conclusions to be drawn from that fact, the motion must be denied.” *Byrd*, 847 S.W.2d at 211.

III. ANALYSIS

According to Mr. Leland, the Louisville Defendants were liable for malicious prosecution because they prosecuted him for theft of the ladders. In order to be successful in a claim for malicious prosecution, the plaintiff must show:

- (a) that a prior lawsuit or judicial proceeding was brought against the plaintiff without probable cause,
- (b) that the prior lawsuit or judicial proceeding was brought against the plaintiff with malice, and
- (c) that the prior lawsuit or judicial proceedings terminated in the plaintiff’s favor.

Parrish v. Marquis, 172 S.W.3d 526, 530 (Tenn. 2005) (citing *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992)); *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 247-48 (Tenn. 1992).

All the elements must be present to sustain an action for malicious prosecution. In its order, the trial court considered each element of the tort. The trial court first concluded that it was not disputed that the Louisville Defendants commenced an action (the criminal prosecution) that terminated in Mr. Leland’s favor, so the third element of the tort was satisfied. As to the malice component in the second element, the trial court determined there were disputed issues of fact which precluded the trial court from ruling on whether the Louisville Defendants acted maliciously. Neither of these conclusions are challenged on appeal. This appeal concerns the first element of the tort, *i.e.*, whether the trial court erred when it granted the Louisville Defendants summary judgment based upon lack of proof that the Louisville Defendants did not have probable cause to believe Mr. Leland stole the ladders at issue.

The trial court recognized that the element of probable cause in a malicious prosecution action is not a mixed question of law or fact, but is a question of fact for the jury where a dispute of fact exists. *Roberts*, 842 S.W.2d at 248-49. As framed by the trial court, the trial court’s role is to examine the facts to decide whether the Louisville Defendants had probable cause based on the facts known to them when the criminal action was initiated. As to the Louisville Defendants’ arguments that the jury verdict in the Kentucky case was “irrefutable evidence” that they had probable cause, the trial court found the Kentucky decision was not determinative as to the facts and circumstances that existed when the Louisville Defendants prosecuted Mr. Leland.

After making this finding, the trial court proceeded to review the record on the issue of other potential bases for probable cause or lack thereof. The trial court found that in order to defend the summary judgment motion, the burden rested on Mr. Leland to come forward with proof that the Louisville Defendants lacked probable cause. Finding as a matter of law that Mr. Leland failed to carry his burden of providing evidence that the Louisville Defendants lacked probable cause, the trial court granted summary judgment to the Louisville Defendants.

Mr. Leland argues that the court erred in this ruling for two reasons. First, Mr. Leland argues the issue of probable cause, other than the Kentucky verdict, was not raised by the Louisville Defendants in its motion for summary judgment. In other words, the Louisville Defendants relied solely on that verdict as the basis for its motion. Second, Mr. Leland argues that there existed disputes of material fact as to probable cause that precluded summary judgment.

Louisville Ladder filed its motion for summary judgment on August 9, 2005, arguing that the judgment in the civil Kentucky lawsuit against its insurance company is “irrefutable proof that Louisville Ladder had ‘probable cause’ for accusing Leland of theft.” Throughout the pleadings filed herein, the Louisville Defendants continued to rely solely upon the Kentucky civil verdict to negate the probable cause element. The trial court, however, specifically found that the Kentucky civil judgment did not negate the element regarding probable cause.

On appeal, the Louisville Defendants argue that the trial court erred and the Kentucky judgment is, in fact, conclusive proof that the Louisville Defendants had probable cause to prosecute Mr. Leland for theft. We agree with the trial court that the Kentucky judgment is not determinative of what the Louisville Defendants knew when they initiated Mr. Leland’s prosecution.

Our Supreme Court has described the probable cause element in a malicious prosecution action as “such facts and circumstances sufficient to create in a reasonable mind the belief that the accused is guilty of the crime charged.” *Roberts*, 842 S.W.2d at 248. Such is to be determined “solely from an objective examination of the surrounding facts and circumstances.” *Id.* The relevant time for the existence of probable cause is “at the time prosecution was initiated.” *Id.* at 249; *Lantroop v. Moreland*, 849 S.W.2d 793, 797 (Tenn. Ct. App. 1992). It only stands to reason that the question of whether a defendant had probable cause to initiate a criminal action must be decided upon the facts and circumstances known to the defendant when he or she decides to initiate prosecution. In the case before us, the Kentucky judgment relied on by the Louisville Defendants was entered three and one-half years after the grand jury issued an indictment against Mr. Leland. Consequently, the Kentucky judgment did not adjudicate what facts and circumstances were known when the Louisville Defendants initiated Mr. Leland’s prosecution.²

Because the Louisville Defendants sought summary judgment solely on the basis that the Kentucky judgment was conclusive proof that they had probable cause, and because that judgment does not, in and of itself, establish the presence of probable cause at the time the prosecution was initiated, the Louisville Defendants were not successful in affirmatively negating an essential element of Mr. Leland’s claim, *i.e.*, lack of probable cause. Consequently, Mr. Leland’s obligation to come forward with proof creating disputed issues of material fact was never triggered.

As the Supreme Court recently restated in *Cumulus Broadcasting*, in supporting a motion for summary judgment, the moving party must do more than simply argue that the non-moving party has no evidence. 226 S.W.3d at 374. The moving party must either “affirmatively negate” an

²Also, the Kentucky judgment simply found Mr. Leland “and/or” other named employees stole ladders from LLG resulting in a sizable loss. The Kentucky jury verdict did not conclusively find that Mr. Leland stole ladders.

essential element of the claim or “conclusively establish” an affirmative defense. *Id.* If the moving party does not establish either of these requirements, then the non-moving party’s burden of establishing disputed facts is not triggered. *Id.* Accordingly, the trial court’s holding that the Kentucky verdict did not affirmatively negate an essential element of the cause of action should have resulted in denial of the motion.

However, the Louisville Defendants argue that we should affirm the trial court because, under the undisputed facts, the trial court found that Mr. Leland failed to prove the Louisville Defendants lacked probable cause. Because the only stated basis for requesting summary judgment was the Kentucky judgment, neither the trial court nor this court is required to search the record for another basis. Similarly, Mr. Leland was not obligated to respond to any ground other than that stated in the motion. Nevertheless, because the trial court granted summary judgment on the probable cause issue, even though it had found the Kentucky judgment insufficient to show a lack of probable cause, we will examine the trial court’s holding.

Under the facts of this case, whether the Louisville Defendants had probable cause to accuse Mr. Leland of theft boiled down to whether they had reason to believe that Mr. Leland had not paid Louisville Ladder for the ladders. Absent payment, it was reasonable for the Louisville Defendants to believe Mr. Leland was stealing the ladders. If, however, the Louisville Defendants were aware that Mr. Leland had paid for the ladders, then they lacked probable cause to accuse him of theft.

In granting the summary judgment, the trial court recited the undisputed fact Mr. Leland took ladders from LLG and resold them. The trial court then found the remaining issue related to Louisville Ladder’s probable cause to believe Mr. Leland stole the ladders was whether Mr. Leland paid LLG for the ladders. On this key point, the trial court found “other than the bare assertions of the Plaintiff, we find the record devoid of proof that the defendant company had knowledge of any purchase of quantities of ladders for cash from the defendant company.” The trial court’s holding that Mr. Leland failed to prove that he paid for the ladders led the court to conclude that he had failed to prove that the Louisville Defendants lacked probable cause. As a result, the trial court found that the Louisville Defendants were entitled to summary judgment.

The simple absence of documentary proof submitted by Mr. Leland, however, is not sufficient to support a summary judgment. If the Louisville Defendants claimed entitlement to summary judgment because they believed Mr. Leland had stolen the ladders, they were required to put forth proof that Mr. Leland did not pay for the ladders. Only by presenting such proof would they have negated the element of lack of probable cause. Absent that proof and negation, Mr. Leland was not obligated to prove that he did pay for them.

We have examined Mr. Leland’s Responses to Defendants’ Joint Statement of Material Facts and to Defendants’ Responses to Plaintiff’s Statement of Additional Material Facts. We are unable to locate any proof by the Louisville Defendants that Mr. Leland failed to pay for any ladders. Mr. Leland testified in his deposition that he paid for the ladders in cash and that Louisville Ladder took all of his receipts and records for the ladder purchases. Mr. Patterson testified that he had no evidence that Mr. Leland failed to pay for the ladders.

It is undisputed for the purposes of summary judgment that Louisville Ladder sold “blue tag” ladders to employees, that policy dictated the price employees were charged for “blue tag” ladders and that the “procedure” for purchase of the ladders by employees was by cash and that the cash was then turned into the petty cash department. Even if the Louisville Defendants had offered proof that Mr. Leland failed to pay for the ladders, given Mr. Leland’s denials, we would have a dispute of material fact precluding summary judgment.

We conclude that reversal of the trial court’s ruling is required since the trial court did not appropriately allocate the burden of persuasion on summary judgment. The burden was not on Mr. Leland to prove the Louisville Defendants lacked probable cause. Rather, the initial burden was on the Louisville Defendants to negate an essential element of Mr. Leland’s claim, which, in this case meant providing evidence they had probable cause to initiate the criminal prosecution against him. Since they relied solely on the Kentucky verdict and that verdict does not establish probable cause at the time the prosecution was initiated, the Louisville Defendants did not carry their burden. Consequently, the burden did not shift to Mr. Leland to establish that genuine issues of material fact exist.

For these reasons, the trial court is reversed and the case is remanded. Costs of appeal are taxed to Louisville Ladder Group, LLC and David Patterson, for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE